No. 45965-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Eric Morrissey,

Appellant.

Mason County Superior Court Cause No. 13-1-00383-0

The Honorable Judge Amber L. Finlay

Appellant's Reply Brief and Response to State's Cross-Appeal

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ARGUMENT IN RESPONSE TO CROSS-APPEAL

I. THE COURT DID NOT ABUSE ITS DISCRETION BY INSTRUCTING THE JURY ON JUSTIFIABLE AND EXCUSABLE HOMICIDE.

A. Standard of Review.

A trial court's fact-based rulings to instruct the jury on excusable homicide and self-defense are reviewed for abuse of discretion. *State v. Brightman*, 155 Wn.2d 506, 519, 122 P.3d 150, 157 (2005); *State v. George*, 161 Wn. App. 86, 94, 249 P.3d 202, 206 (2011).

B. Excusable homicide applies to manslaughter under the plain language of RCW 9A.16.030.

When interpreting a statute, the court must "discern and implement the legislature's intent." *State v. Williams*, 171 Wn.2d 474, 477, 251 P.3d 877 (2011). The inquiry "begins with the plain language of the statute." *State v. Christensen,* 153 Wn.2d 186, 194, 102 P.3d 789 (2004). Absent evidence of a contrary intent, the court must give statutory language its plain and ordinary meaning. *State v. Lilyblad,* 163 Wn.2d 1, 6, 177 P.3d 686 (2008). If a criminal statute is ambiguous, the rule of lenity requires the court to construe it in favor of the accused. *State v. Slattum*, 173 Wn. App. 640, 643, 295 P.3d 788 (2013) *review denied,* 178 Wn.2d 1010, 308 P.3d 643 (2013).

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and accurately state the law. *State v. Slaughter*, 143 Wn. App. 936, 941, 186 P.3d 1084, 1086 (2008).

The legislature has defined homicide to include manslaughter as well as murder. RCW 9A.32.010. Homicide is excusable "when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent." RCW 9A.16.030. Excusable homicide applies when the accused person accidentally kills another while acting in self-defense. *Slaughter*, 143 Wn. App. at 942; *Brightman*, 155 Wn.2d at 525 n. 13.

Here the evidence demonstrated that Mr. Morrissey acted in self-defense when he used force against Newman.[1] RP 259, 442-43, 671-75. The evidence also showed that the eleven-second fistfight did not constitute an intentional attack on Newman's life.[2] RP 933; Ex 59. The court's excusable homicide instructions properly informed the jury that the state bore the burden of proving the absence of excuse. The instructions helped jurors understand the import of the evidence regarding accidental

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[1] Additional argument on this point is set forth below.

[2] Indeed, the jury acquitted Mr. Morrissey of intentional murder. CP 30.

death resulting from the lawful use of force. *Slaughter*, 143 Wn. App. at 942; *Brightman*, 155 Wn.2d at 525 n. 13

Even so, the state argues that the court's excusable homicide instruction was improper as to Mr. Morrissey's manslaughter charge. Brief of Respondent, pp. 10-13. According to Respondent, excusable homicide never applies in first-degree manslaughter cases.[3] Brief of Respondent, pp. 10-13. But the state fails to address the plain language of the statute, which specifies that excusable homicide is available as a defense to any homicide. *See* Brief of Respondent; RCW 9A.16.030. Homicide includes manslaughter as well as murder. RCW 9A.32.010.

Likewise, the excusable homicide statute creates a defense when an act is done "without criminal negligence, *or* without any unlawful intent." RCW 9A.16.030 (emphasis added). The state completely ignores the statutory phrase concerning intent. Brief of Respondent, pp. 9-13. Mr. Morrissey's manslaughter charge did not require any evidence that he had acted intentionally. RCW 9A.32.060(1)(a). Insofar as the excusable homicide statute is ambiguous, that ambiguity must be resolved in favor of

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[3] In support of this argument, the state relies exclusively on *dicta* in *State v. Norman*, 61 Wn. App. 16, 28-29, 808 P.2d 1159 (1991). Brief of Respondent, p. 12. But *Norman* did not address the propriety of a jury instruction on excusable homicide. Rather, the *Norman* court considered whether the state constitution's guarantee of freedom of religion prohibited conviction of a parent for manslaughter based on failure to provide medical care to a child on religious grounds. *Id.* The issue in Mr. Morrissey's case was not before the court in *Norman* and the state's reliance on that case is misplaced.

Mr. Morrissey. *Slattum*, 173 Wn. App. at 643. The rule of lenity supports the court's jury instructions on excusable homicide, because Mr. Morrissey acted "without any unlawful intent." RCW 9A.16.030; *Id.*

The state also neglects to consider the full import of its argument. If excusable homicide were inapplicable to reckless manslaughter, it would also be inapplicable to murder, which requires an even higher *mens rea*. But the Supreme Court and the Court of Appeals have repeatedly endorsed excusable homicide instructions in both murder and manslaughter cases. *See e.g. Brightman*, 155 Wn.2d at 526; *Slaughter*, 143 Wn. App. 936; *State v. Baker*, 58 Wn. App. 222, 792 P.2d 542 (1990); *State v. Mercer,* 34 Wn. App. 654, 633 P.2d 857 (1983) *abrogated on other grounds by State v. Norlin*, 134 Wn.2d 570, 951 P.2d 1131 (1998).

If accepted, the state's argument would mean that excusable homicide would be available only as a defense to negligent manslaughter. The state asks this court to ignore the plain language of the statute and extensive prior caselaw. The state's argument lacks merit.

The state does not claim that the instructions given in Mr. Morrissey's case inaccurately stated the law. Brief of Respondent, pp. 9-13. Rather, the state argues that the excusable homicide instruction "was unnecessary and potentially confusing to the jury." Brief of Respondent, p. 12. This is not the correct standard: the trial court has discretion to

provide instructions that correctly state the law. *Slaughter*, 143 Wn. App. at 941.

The state also neglects to specify how the court's instructions prejudiced the prosecution. Brief of Respondent, pp. 9-13. This failure can be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

The state has not shown an abuse of discretion. *Brightman*, 155 Wn.2d at 519. The court properly instructed the jury on the defense of excusable homicide in Mr. Morrissey's case. *Slaughter*, 143 Wn. App. at 942; *Brightman*, 155 Wn.2d at 525 n. 13. The state's argument should be rejected.

C. The court properly instructed the jury regarding the lawful use of force.

If an accused person presents some evidence of self-defense, the state must then prove beyond a reasonable doubt that the use of force was unlawful. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012) *review denied,* 176 Wn.2d 1015, 297 P.3d 708 (2013); U.S. Const Amend. XIV. The evidence is taken in a light most favorable to the defense. *George*, 161 Wn. App. at 96. The burden is low, and need not rise to the level of a reasonable doubt. *Id.* An accused person who meets this burden has a constitutional right to have the jury consider self-

defense. *Id.,* at 100-101. A trial court may not deny an accused person's proffered self-defense instructions unless that theory is completely unsupported by the evidence. *Id.,* at 100.

Self-defense involves both an objective and subjective component:

> The subjective component requires the trial court to place itself in the defendant's shoes and to view the defendant's actions in light of all the facts and circumstances known to the defendant. The objective component requires the trial court to determine what a reasonably prudent person would have done in the defendant's situation.

George, 161 Wn. App. at 96 (internal citations omitted).

The accused need not personally testify, or present evidence of an actual belief that s/he was about to be injured. *See e.g. State v. Miller*, 89 Wn. App. 364, 368, 949 P.2d 821, 823 (1997). Rather, the evidence must – if believed -- demonstrate that someone in the position of the accused would have been placed in reasonable fear. *Id.* This analysis incorporates both the objective and subjective components of the self-defense standard. *Id.*

Here, the state concedes that the evidence was sufficient to demonstrate that bystanders reasonably believed that Mr. Morrissey was about to be injured. Brief of Respondent, pp. 16. The state also agrees that the evidence is sufficient to deduce how the conditions would have appeared to Mr. Morrissey. Brief of Respondent, p 17. Finally, the state

admits that a person in Mr. Morrissey's position could have reasonably believed that he was about to be injured. Brief of Respondent, pp. 17-18.

These concessions support the trial court's decision to instruct on self-defense. *George*, 161 Wn. App. at 96. Nonetheless, the state argues that self-defense instructions were improper in Mr. Morrissey's case because he exercised his right to remain silent at trial and, accordingly, did not testify to his actual personal perceptions and beliefs at the time. Brief of Respondent, pp. 16-18.

The state drastically misstates the subjective component of the self-defense analysis. The standard does not require the accused to testify as to his/her personal impressions. *See e.g. Miller*, 89 Wn. App. at 368. Rather, the court must simply consider all of the facts and circumstances known to the accused at the time of the use of force. *George*, 161 Wn. App. at 96.

The state admits that, taking the evidence in the light most favorable to the defense, the facts known to Mr. Morrissey were sufficient to create a reasonable belief that he was about to be injured. Brief of Respondent, pp. 16-18. Accordingly, the state's concessions establish that the jury was properly instructed on self-defense. *Id.* This court should accept those concessions.

The state essentially argues that a person can never claim self-defense without waiving the right to remain silent. Brief of Respondent, pp. 16-18. The state does not cite to any applicable authority to support that claim.[4] Brief of Respondent, pp. 13-19. Indeed, such a holding would raise serious issues regarding the constitutional right to remain silent at trial.

The court properly instructed the jury on self-defense in Mr. Morrissey's case. *George*, 161 Wn. App. at 96. Failure to do so would have violated Mr. Morrissey's constitutional rights. *Id.* at 100-01. The state's argument to the contrary is misplaced.

II. THE COURT PROPERLY REFUSED THE STATE'S INITIAL AGGRESSOR INSTRUCTION, WHICH WOULD HAVE RELIEVED THE STATE OF ITS BURDEN OF PROOF.

A. Standard of Review.

Whether sufficient evidence justifies a first aggressor instruction in a self-defense case is reviewed *de novo*. *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010). A trial court violates an accused person's

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[4] The authority upon which the state relies is inapposite. Brief of Respondent, pp. 18-19 (*citing State v. Graves,* 97 Wn. App. 55, 62, 982 P.2d 627 (1999); *State v. Dyson*, 90 Wn. App. 433, 438-39, 952 P.2d 1097 (1997); *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). *Graves* and *Janes* both address the requirement that the trial court consider the situation from the perspective of the accused, taking into account all that s/he knew at the time. *Graves*, 97 Wn. App. at 62; *Janes*, 121 Wn.2d at 238. Neither establishes a *per se* rule requiring an accused person to testify. *Graves*, 97 Wn. App. at 62; *Janes*, 121 Wn.2d at 238.

constitutional rights by erroneously instructing the jury on the aggressor doctrine. *Id.* at 961.

B. The initial aggressor instruction is disfavored and inapplicable to Mr. Morrissey's case.

Washington courts disfavor aggressor instructions.[5] *Stark*, 158 Wn. App. at 960 *(citing State v. Arthur,* 42 Wn. App. 120, 125 n. 1, 708 P.2d 1230 (1985)). Such instructions are rarely necessary to permit the parties to argue their theories of the case. *Id.* Additionally, courts should "use care" when giving an aggressor instruction because it might relieve the state of its burden of proof in a self-defense case. *Id.* (*citing Riley,* 137 Wn.2d at 910 n. 2).

Here, the court properly rejected the state's proposed aggressor instruction. There was no evidence that Mr. Morrissey drew a weapon, raised his fists, or lunged toward Newman. Indeed, the state's key witness testified that it was Mr. Newman who approached Mr. Morrissey and his friends, inserted himself into their group, and challenged each one in turn

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In *Dyson,* the accused testified at trial. *Dyson* did not address whether the subjective component could be met without such evidence. *Dyson*, 90 Wn. App. 433.

[5] A person who was the first aggressor in an interaction may not claim self-defense. *Stark*, 158 Wn. App. at 959. The state has the burden of production to justify instructing the jury on the first aggressor rule. *Id.* To obtain an aggressor instruction, the state must show (1) an intentional act (other than the charged crime), (2) that is more than mere words, (3) that a jury could reasonably assume would provoke a belligerent response. *Stark*, 158 Wn. App. at 960 (*citing State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999)); *State v. Wasson,* 54 Wn. App. 156, 159, 772 P.2d 1039, *review denied,* 113 Wn.2d 1014, 779 P.2d 731 (1989).

to fight.[6] RP 257-59. Mr. Morrissey did not take any action until after Newman had done so.

The prosecutor argued that the instruction was proper because Mr. Morrissey and his friends allegedly talked about beating Newman up while walking through downtown Shelton. RP 852-53. But words alone are insufficient to justify an aggressor instruction. *Stark*, 158 Wn. App. at 960. As the court pointed out, there was also no evidence that Newman ever heard those alleged comments. RP 849. Finally, there was no evidence that Mr. Morrissey personally made any threatening statements. *See* RP *generally.*

Mr. Morrissey's only threatening action began when he head-butted Newman. That conduct constitutes the charge itself and cannot provide the basis for an aggressor instruction. *Stark*, 158 Wn. App. at 960.

The state notes that each party is entitled to jury instructions permitting it to argue its theory of the case. Brief of Respondent, p. 20. But the state does not explain any manner in which the court's self-defense instructions were inadequate to meet that purpose. Brief of Respondent, pp. 19-22. The court instructed the jury that a person may only use force in self-defense if s/he reasonably believes that s/he is about

[6] A more distant bystander testified that the group of Mr. Morrissey and his friends "swarmed" Newman. RP 503. But no witness testified that Mr. Morrissey, specifically, made any threatening movements.

to be injured. CP 118. The instructions also informed the jury that the person may only employ as much force as necessary. CP 118, 121. Finally, the instructions permitted the use of force only if Mr. Morrissey had no reasonably effective alternative. CP 121.

These instructions allowed the prosecution to argue its theory of the case. The prosecutor could suggest that did not act out of reasonable fear. CP 118. The prosecution was also free to argue that Mr. Morrissey could simply have avoided Newman in the first place, if the jury believed that Mr. Morrissey approached Newman rather than the other way around. CP 121.

As the Court of Appeals and the Supreme Court have repeatedly noted, the general instructions on self-defense are sufficient to permit the state to argue that the use of force was not lawful if the accused was the first aggressor. *Stark*, 158 Wn. App. at 960; *See also State v. Douglas*, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005); *Arthur*, 42 Wn. App. at 125 n. 1; *Riley*, 137 Wn.2d at 910 n. 2.

The court properly denied the state's proposed aggressor instruction. *Stark*, 158 Wn. App. at 960. The court's instructions were sufficient to permit the state to argue its theory of the case. *Id.* Indeed, an aggressor instruction in Mr. Morrissey's case would have violated his

constitutional rights by relieving the state of its burden to disprove self-defense. *Id*.

ARGUMENT IN REPLY TO STATE'S RESPONSE

III. THE COURT'S INSTRUCTIONS VIOLATED DUE PROCESS BY PERMITTING THE JURY TO CONVICT MR. MORRISSEY ABSENT EVIDENCE THAT HE RECKLESSLY DISGREGARDED A SUBSTANTIAL RISK THAT HIS ACTIONS WOULD CAUSE NEWMAN'S DEATH.

Due process requires the jury to be instructed in a manner that makes the state's burden manifestly clear. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Instructional error requires reversal if it relieves the state of its burden to prove each element of an offense. *State v. Weaville*, 162 Wn. App. 801, 815, 256 P.3d 426 (2011) (*citing State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)).

In Mr. Morrissey's case, the court instructed the jury using two contradictory definitions of recklessness. One definition required the state to prove that Mr. Morrissey knew of and disregarded a substantial risk that he would cause bodily harm. CP 106.

This instruction should have applied only to the second-degree assault underlying the felony murder charge. RCW 9A.36.021(1)(a). The definition relevant to Mr. Morrissey's manslaughter charge required the state to prove that he knew of and disregarded a substantial risk of death.

CP 124. The court erred, however, by neglecting to clarify for the jury that only the second definition applied to manslaughter. CP 106, 124.

As a result, the court's instructions permitted the jury to convict Mr. Morrissey of manslaughter based only on disregard of the risk of injury, rather than the risk of death. This substantially lowered the state's burden.

The court also instructed the jury that the order of the instructions had no significance. CP 93. Still, the state argues that the order of the instructions cured the court's error.[7] Brief of Respondent, pp. 25-27. Respondent's claim is directly contradicted by the jury instructions themselves.

The instructional error violated Mr. Morrissey's right to due process by relieving the state of its burden of proof on the manslaughter charge. *Kyllo*, 166 Wn.2d at 864. As such, the issue can be error can be raised for the first time on review as manifest error affecting a constitutional right. RAP 2.5(a)(3). Additionally, Mr. Morrissey brought the error to the court's attention in a motion for a new trial. CP 83-86.

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[7] Respondent also notes that neither party focused at length on the different definitions of recklessness during closing argument. Brief of Respondent, p. 27. If anything, that fact makes the situation worse. Indeed, the instructional error may have been harmless if the prosecutor had made clear during closing that only the second recklessness definition applied to the manslaughter charge. But that did not happen. Instead, the jury was left with two competing definitions and no guidance as to how to apply them.

Such a post-trial motion is sufficient to preserve an error for review. *State v. Ray*, 116 Wn.2d 531, 539, 806 P.2d 1220, 1225 (1991) (*citing State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452, 455 (1979)). Even so, the state argues that this court should not review the issue because Mr. Morrissey failed to object below. Brief of Respondent, p. 28 (*Citing State v. Brantley*, 11 Wn. App. 716, 720, 525 P.2d 813 (1974); *State v. Dent*, 123 Wn.2d 467, 478, 869 P.2d 392 (1994); *Young v. Group Health Co-op of Puget Sound*, 85 Wn.2d 332, 339-340,534 P.2d 1349 (1975)).

The cases cited by Respondent do not apply here. Each of those cases addresses non-constitutional error. The cases also address only errors that were never brought to the trial court's attention in any manner. *Brantley*, 111 Wn. App. 716; *Dent*, 123 Wn.2d 467, *Young*, 85 Wn.2d 339-40. Here, Mr. Morrissey raises constitutional error that was brought to the trial court's attention in his post-trial motion. The state's argument is misplaced.

When the court's instructions relieve the state of its burden of proof, reversal is required unless the state can establish beyond a reasonable doubt that the verdict would have been the same absent the error. *Weaville*, 162 Wn. App. at 815. Additionally (as Respondent points out) jury instructions that are inconsistent or contradictory on a material

issue are always prejudicial because it is impossible to determine their effect on the verdict. Brief of Respondent, p. 29 (*citing Hall v. Corp. of Catholic Archbishop of Seattle,* 80 Wn.2d 797, 804, 498 P.2d 844, 849 (1972)).

The instructions here relieved the state of its burden and directly contradicted each other on a material issue. Still, Respondent claims without explanation that the two definitions of recklessness in Mr. Morrissey's case were not inconsistent or contradictory. Brief of Respondent, p. 30. The state does not clarify how two different definitions for a single term, one requiring a much lower disregard of risk than the other, could be anything but inconsistent. The instructions provided two incompatible versions of the state's burden. The state cannot prove beyond a reasonable doubt that the verdict was unaffected.[8] *Weaville*, 162 Wn. App. at 815.

[8] The state speculates that the jury "would not assume that they could arbitrarily choose between the two instructions." Brief of Respondent, p. 30. But such conjecture does not clarify which definition of recklessness the jury applied to each charge. Even if Respondent's guess is correct, it does not establish that the jury knew to apply the higher standard to the manslaughter charge rather than to the felony murder charge. The state's speculation also does not account for the possibility that the jury, upon flipping through their lengthy instruction packet, simply found the first definition of recklessness that was not keyed to any one charge and applied it across the board, oblivious that a contradictory definition was buried later in the packet.

The court's instructions violated due process by failing to make the state's burden manifestly clear to the jury. *Kyllo*, 166 Wn.2d at 864. Mr. Morrissey's manslaughter conviction must be reversed. *Id.*

IV. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. MORRISSEY OF MANSLAUGHTER.

Mr. Morrissey relies on the argument set forth in his Opening Brief.

V. THE JURY'S INCONSISTENT VERDICTS VIOLATED MR. MORRISSEY'S RIGHT TO DUE PROCESS.

Mr. Morrissey relies on the argument set forth in his Opening Brief.

VI. THE COURT VIOLATED MR. MORRISSEY'S SIXTH AMENDMENT RIGHT TO COUNSEL BY IMPROPERLY ORDERING HIM TO PAY DEFENSE COSTS.

Mr. Morrissey relies on the argument set forth in his Opening Brief.

CONCLUSION

For the reasons set forth above and in Mr. Morrissey's Opening Brief, Mr. Morrissey's manslaughter conviction must be reversed. In the alternative, the order for Mr. Morrissey to pay $4750 in defense costs must be vacated.

The state's cross-appeal lacks merit. The court properly instructed the jury regarding excusable homicide and lawful use of force, and properly rejected the state's first aggressor instruction. On remand, the jury should be similarly instructed.

Respectfully submitted on January 5, 2015,

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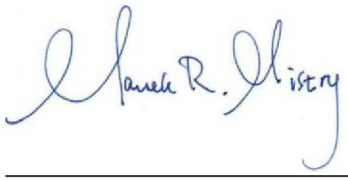

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 5, 2015.

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